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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES CONNORS KARO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Richard Miles Horton, William Robertson Harley, Michael Gaylord Steele and Evan Roth are respondents in this Court. Gene R. Rhodes was a party to the proceedings below but is not a respondent herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a-15a) is reported at 710 F.2d 1433. The opinion of the district court (App. *infra*, 16a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. *infra*, 23a) was entered on June 20, 1983. A petition for rehearing was denied on August 26, 1983 (App. *infra*, 24a). On October 17, 1983, Justice White extended the time within which to file a petition for a writ of certiorari to and including November 24, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

In an indictment filed in the United States District Court for the District of New Mexico, respondents and co-defendant Gene R. Rhodes were charged with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Respondents Horton, Harley, Steele and Roth were also charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, the indictment charged respondent Karo with possession of cocaine with intent to distribute it and distribution of cocaine, both in violation of 21 U.S.C. 841(a)(1).

1. Prior to trial, respondents filed a joint motion to suppress evidence seized in a warrant-authorized search of a house in Taos, New Mexico. Respondents contended that the search warrant for the Taos residence was invalid because it was based on information derived from allegedly unlawful beeper surveillance.

The evidence at the suppression hearing showed that on March 3, 1980, in Albuquerque, New Mexico, Drug Enforcement Administration (DEA) agents conducted a judicially authorized search of a storage locker rented by Richard Logan and discovered laboratory equipment, glassware and chemicals used to manufacture amphetamines. Some of the boxes containing laboratory equipment and chemicals bore shipping labels addressed to Carl Muehlenweg of Graphic Photo Design

in Albuquerque. H. Tr. 46-47, 167-169, 307. Approximately six weeks later, DEA agents executed search warrants at Graphic Photo Design, which turned out to be Muehlenweg's residence, and at T & M Research, where Muehlenweg worked. At those locations, the agents discovered invoices and statements reflecting that Muehlenweg had ordered and obtained laboratory glassware and chemicals that had been found in Logan's locker. H. Tr. 47-48, 165, 177.

Shortly thereafter, Muehlenweg acknowledged to the DEA that Logan had ordered chemicals and laboratory glassware through him, and he agreed to become a DEA informant (H. Tr. 42-43, 126, 167-168, 308-309).[1] Muehlenweg also apprised the agents that he had previously ordered ether for respondents Karo, Horton, and Harley for their use in the production of cocaine. In late August 1980, Muehlenweg told DEA Agent Richard Rottinger that he had ordered a 50-gallon shipment of ether for Karo, Horton, and Harley, which they planned to use to extract cocaine from clothing that had been imported into the United States. H. Tr. 124-130, 178, 191, 196, 257-258. Agent Rottinger confirmed that Muehlenweg had ordered and paid for ten five-gallon cans of ether from BWR Scientific, Inc., for delivery in September 1980 (H. Tr. 48-50, 143-146).

Prior to the arrival of that shipment, the government obtained a court order authorizing the installation and monitoring of a beeper[2] in one of the cans of

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[1] A few weeks later, after being tipped off by Muehlenweg, agents observed Logan pick up chemicals and equipment from Muehlenweg, but Logan shot and killed himself when the agents moved in to arrest him (H. Tr. 91, 125-126, 169, 309-310).

[2] "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 1.

ether that had been ordered by Muehlenweg.[3] With Muehlenweg's permission, the DEA picked up the shipment from the common carrier, substituted a can containing a beeper for one of the cans in the shipment, repainted the cans so that they would all look alike, and then delivered them to Muehlenweg's residence. H. Tr. 48-54. On September 20, 1980, agents observed resondent Karo pick up the ether from Muehlenweg's house and, using visual and beeper surveillance, followed Karo as he transported the ether to his residence in Muehlenweg's automobile. Still under surveillance, Karo then returned the automobile to Muehlenweg's residence. App. *infra*, 4a; H. Tr. 58-59, 181-182, 275.

By monitoring the beeper later that day, the agents ascertained that the ether had been transferred to respondent Horton's house. The ether's presence at that location was confirmed by a DEA agent who walked along the sidewalk and smelled the odor of ether

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[3] The affidavit in support of the application for the beeper authorization order falsely indicated that Muehlenweg was a target of the DEA investigation relating to the ether shipment, and did not state that he was cooperating with the DEA as a confidential informant. According to the testimony of the prosecutor involved, the affidavit was drafted in that manner in order to preserve Muehlenweg's usefulness as a confidential informant and to protect his safety in the event the targets of the investigation obtained copies of the warrant applications. H. Tr. 232-236, 254. The prosecutor was concerned that the targets might ultimately obtain the applications if the district court adopted target notification procedures analogous to those contained in the federal wiretap statute, 18 U.S.C. 2518(8)(d) (H. Tr. 237-238). The prosecutor and Agent Rottinger testified, however, that at the time the application was made, the prosecutor orally advised the issuing judge that Muehlenweg was actually cooperating in the investigation, and that he explained to the judge that that information had been omitted from the warrant application to preserve Muehlenweg's confidential informant status (H. Tr. 208-209, 237, 246).

emanating from Horton's residence. App. *infra*, 4a-5a; H. Tr. 59-60, 182-183. Subsequent monitoring of the beeper two days later, on September 22, 1980, revealed that the ether had been moved to the home of Horton's father. The following day, the agents traced the ether by means of the beeper to a commercial self-storage facility in Albuquerque. The beeper did not enable the agents to identify the particular locker that contained the chemical; however, the agents detected the odor of ether emanating from locker 143 and ascertained that respondents Horton and Harley had rented that locker. On October 8, 1980, the agents obtained an order authorizing installation of an entry tone alarm in that locker. During installation of the alarm on the following day, the agents saw the cans of ether inside the locker. The alarm malfunctioned, however, and the agents did not learn that the ether had been removed by respondent Horton until October 16, 1980, when they were so notified by the manager of the storage facility. App. *infra*, 5a; H. Tr. 60-61, 62-73, 182-184, 216-217.

Three days later, on October 19, the agents picked up the beeper signal at another self-storage facility in Albuquerque. With the permission of the storage facility's manager, the agents installed a closed circuit video camera that was focused on the door of locker 15, which had been rented under an alias by respondents Horton and Harley. On December 31, 1980, agents monitoring the camera observed respondents Horton and Harley enter the locker, and on February 6, 1981, they observed co-defendant Rhodes and an unidentified woman remove the cans of ether and load them into Horton's pickup truck. By means of both visual and beeper surveillance, agents followed the truck to Rhodes' residence, where it was parked in the driveway. App. *infra*, 5a-6a; H. Tr. 82-85, 97-103, 155.

Later that day, DEA agents followed the truck containing the ether to a residence in Taos, New Mexico rented by respondents Horton, Harley, and Steele. During their surveillance of the Taos residence, the agents monitored the beeper to determine its continued presence at the house. App. *infra*, 6a; H. Tr. 100-103, 111-112, 120, 135-138, 156-158. Relying on information obtained in the course of their investigation, including information derived through the use of the beeper regarding the various locations to which the ether had been transported, the agents secured a search warrant for the Taos residence. On February 10, 1981, the warrant was executed, cocaine and laboratory equipment were seized, and respondents Horton, Harley, Steele and Roth were arrested. App. *infra*, 6a.

2. The district court granted respondents' motion to suppress the evidence seized at the Taos residence (App. *infra*, 25a). The court concluded that the order authorizing the installation of the beeper was invalid because the government had made deliberate misrepresentations in the warrant application, and that the evidence in question was the fruit of the improperly authorized beeper surveillance (Tr. 331-334). Thereafter, the district court denied the government's motion to reconsider its suppression ruling, rejecting the argument that the installation and monitoring of the beeper did not require a warrant (App. *infra*, 16a-22a, 26a).

3. On appeal, the government did not challenge the district court's finding that the order authorizing the beeper was invalid (App. *infra*, 3a).[4] Rather, the gov-

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[4] Because the inaccuracies in the written warrant application were not designed to mislead the magistrate, the true facts were revealed to the magistrate prior to issuance of the beeper warrant, and the variation between the written statement and the oral disclosure could not have affected the finding of probable cause, we believe the district court erred in invalidating the

ernment contended that the Fourth Amendment does not require a warrant for the installation and monitoring of a beeper, that the defendants lacked "standing" to contest the use of the beeper, and that the evidence seized pursuant to the search warrant for the Taos residence was not the fruit of the beeper surveillance.

The court of appeals affirmed the suppression order except as to co-defendant Rhodes (App. *infra*, 1a-15a).[5] At the outset, the court rejected the argument that the defendants could not have had any legitimate expectations of privacy in the can of ether because the ether was intended for use in the manufacture of contraband (*id.* at 3a-4a). The court then concluded (*id.* at 6a-9a) that Karo's Fourth Amendment rights were violated at the time he picked up the can of ether from Muehlenweg because the installation of the beeper in the can had not been authorized by a valid warrant. In so concluding, the court expressly refused to follow the holdings of other courts that have ruled that no warrant is required to install a beeper in a container with the consent of the owner (*id.* at 6a-7a). The court explained (*id.* at 7a-9a) (footnotes and citation omitted):

> Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an intrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that

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beeper warrant. That issue, not having been preserved on appeal, is not presented here.

[5] The court held that Rhodes, who transported the ether from Albuquerque to Taos, failed to establish that his legitimate expectations of privacy had been violated by the beeper surveillance or the search of the Taos residence. App. *infra*, 14a-15a.

> would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless government intrusion is unquestioned. * * * The installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed. * * * We believe that individuals have a reasonable and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process. * * * Thus, regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control. The consent of the owner to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search the suitcase after it comes under the ownership of another.

The court also held that the monitoring of the beeper without a valid warrant violated the Fourth Amendment (App. *infra*, 9a-11a). It sought to distinguish this Court's decision in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), on the following grounds: that here the beeper was monitored while the can was inside private premises and storage lockers, whereas in *Knotts* the beeper was never monitored inside a residence; that, unlike in *Knotts*, the monitoring here gave the agents information they could not have discovered even by constant visual surveillance; that the surveillance in *Knotts* lasted only a short time, whereas here it covered a five-month period; and that here, unlike in *Knotts*, the officers lost track of the can

for substantial periods of time and much of the tracing of the ether to new locations was possible only by use of the beeper. App. *infra*, 9a-10a. Relying on *United States* v. *Moore*, 562 F.2d 106, 113 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), and *United States* v. *Bailey*, 628 F.2d 938, 940 (6th Cir. 1980), while expressly rejecting the contrary ruling in *United States* v. *Bernard*, 625 F.2d 854, 861 (9th Cir. 1980), the court concluded (App. *infra*, 10a) that "the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure."[6]

REASONS FOR GRANTING THE PETITION

Last Term, in *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), this Court held that the use of a beeper by law enforcement officers to trace a can of chemicals

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[6] Rejecting the argument that the evidence seized pursuant to the search warrant for the Taos residence was not the fruit of any illegal beeper surveillance, the court of appeals found a direct link between the beeper monitoring and the information that the ether was at the Taos residence (App. *infra*, 11a-12a). The court noted (*id.* at 14a n.6) that, even though there were breaks in the monitoring between the initial delivery of the ether to Karo and the tracking of the ether to Taos, there was no break between the monitoring of the beeper while it was in the second storage locker and its transfer to the Taos residence.

In addition, the court rejected the argument that respondent Roth (who was a visitor at the Taos residence and had stayed there for several days prior to the search) and Karo (who had no connection with that residence, but whose rights allegedly were infringed by the installation of the beeper) lacked "standing" to seek suppression of the evidence (App. *infra*, 13a-14a).

We do not here raise the fruits and "standing" issues, except insofar as a favorable resolution of the first question presented would establish that there was no violation of respondent Karo's Fourth Amendment rights.

from its place of purchase to the defendant's residence did not violate the defendant's legitimate expectations of privacy and thus did not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. This case presents two important and recurring Fourth Amendment questions relating to beeper surveillance that the Court did not specifically resolve in *Knotts*. The first question is whether, as the court of appeals held, the mere installation of a beeper in a container with the consent of the original owner amounts to a search or seizure that, unless authorized by a valid warrant, infringes the new owner's Fourth Amendment rights at the time the container comes into his possession. The second question is whether the warrantless monitoring of a beeper's signals violates the Fourth Amendment whenever, at the time of monitoring, the container in which the beeper has been installed is situated inside a home or other "private" area. The holdings of the court of appeals on both of these questions are in direct conflict with the decisions of other courts of appeals. Accordingly, review by this Court is warranted to resolve the conflicts on these important questions of Fourth Amendment law.

1. Cases involving the permissibility of beeper use ordinarily raise two distinct issues, one relating to the installation of the beeper in a package or conveyance, the other relating to the monitoring of signals transmitted by the beeper. Although the Court in *Knotts* recognized this distinction, it did not pass on the installation issue because Knotts did not challenge the warrantless installation of the beeper in his case. The Court noted, however, that several courts of appeals have approved warrantless installations. *Knotts*, slip op. 3 n.*, citing *United States* v. *Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States* v. *Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 (8th

Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Miroyan*, 577 F.2d 489, 493 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *United States* v. *Cheshire*, 569 F.2d 887, 889 (5th Cir.), cert. denied, 437 U.S. 907 (1978); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Abel*, 548 F.2d 591, 592 (5th Cir.), cert. denied, 431 U.S. 956 (1977); *United States* v. *Hufford*, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976). See also *United States* v. *Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981), rev'd on other grounds, No. 81-1802 (Mar. 2, 1983); *United States* v. *Bailey*, 628 F.2d 938, 943 (6th Cir. 1980); *United States* v. *Devorce*, 526 F. Supp. 191, 199-200 (D. Conn. 1981), aff'd *sub nom. United States* v. *Lombardo*, 697 F.2d 299 (2d Cir. 1982) (table), cert. denied, No. 82-5459 (Mar. 7, 1983). Indeed, in this case, the court of appeals expressly acknowledged (App. *infra*, 6a-7a) that other courts have upheld the warrantless installation of a beeper inside a container with the consent of the original owner. This clear conflict requires resolution by this Court.

We believe the holding of the court of appeals is plainly incorrect. As is evident from its own analysis of the installation issue (App. *infra*, 7a-9a), the intrusion, if any, into legitimate expectations of privacy occasioned by beeper surveillance occurs when a beeper is *monitored* to ascertain the location of the container in which it has been installed. No search or seizure of any sort occurs when the beeper is placed inside the container with the consent of the original owner or when the container is transferred to the suspect purchaser. Unless the beeper is activated and its signals monitored, the beeper tells nothing about the whereabouts of the container. Thus, the court's analogy to a previous owner of a suitcase consenting to subsequent searches of the suitcase (*id.* at 8a-9a) is totally inapposite. Al-

though the owner of a container generally has a legitimate expectation of privacy in the contents of the container, a beeper does not disclose the container's contents, which are already known to the agents when they install the beeper with the original owner's consent. Instead, the beeper discloses only the present location of the container. As the Court held in *Knotts*, however, there is no legitimate expectation of privacy with respect to this information, at least where the container's location could have been ascertained by visual surveillance of the suspect's vehicle while it travelled over public roads.

Here, respondent Karo certainly had no greater privacy interest in the location of the container than did the defendant in *Knotts*. There, the beeper was used to ascertain the arrival of a can of chemicals on the defendant's premises. Because this same information could have been obtained through constant visual surveillance, the Court concluded that the use of the beeper did not implicate Fourth Amendment concerns. In this case, insofar as respondent Karo is concerned, the beeper revealed only that Karo transported the container of ether in Muehlenweg's automobile from Muehlenweg's residence to his own home. As was the case in *Knotts*, this same information could have been obtained by direct visual surveillance. Moreover, as the court of appeals conceded (App. *infra*, 13a), Karo could not establish a legitimate expectation of privacy in the locations at which the beeper was monitored after it left his house, including the Taos residence where the warrant-authorized search uncovered an illicit drug manufacturing laboratory. The court nevertheless concluded that Karo could move to suppress the evidence seized from that residence by virtue of his challenge to the installation of the beeper (*id.* at 14a; see also *id.* at 6a n.1). Under the ruling below, therefore, even where a defendant's legitimate expectations of privacy are not infringed by beeper monitoring, the defendant may still

object to the use of the beeper by challenging its installation. The effect of the court of appeals' decision is to limit *Knotts* to cases in which the defendant's lawyer fails to object to insertion of the beeper.

2. The court of appeals' ruling on the monitoring issue also warrants review. To begin with, the question whether the Fourth Amendment is violated by the warrantless monitoring of a beeper while it is located inside private premises is one on which the courts of appeals are sharply divided. The holding of the court of appeals that a warrant is required in these circumstances is in accord with the decisions of the First and Sixth Circuits, but conflicts with decisions of the Ninth Circuit.

In *United States* v. *Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), the court acknowledged that "the limited data transmitted by a beeper [is] far less revealing than the conversation recorded in *Katz*" and "the level of intrusion * * * less severe." 562 F.2d at 113. The court nevertheless concluded that when the defendants took inside their house a box of chemicals which, unbeknownst to them, contained a beeper, "they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government." *Ibid.*

Relying on *Moore*, the Sixth Circuit, in *United States* v. *Bailey*, 628 F.2d 938, 944 (1980), concluded that "[b]eeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the fourth amendment." Although the agents in *Bailey* had obtained a warrant authorizing the use of the beeper, the court held that the warrant was invalid because it contained no provision limiting the duration of the surveillance. *Id.* at 945-946. Accordingly, it suppressed evidence obtained as a result of the beeper surveillance.

The Ninth Circuit, on the other hand, has consistently held that the Fourth Amendment permits the warrantless monitoring of a beeper attached to a container that has been taken inside private premises. See *United States* v. *Brock*, 667 F.2d 1311, 1318-1322 (1982), cert. denied, No. 81-6922 (Mar. 7, 1983); *United States* v. *Bernard*, 625 F.2d 854, 860-861 (1980); *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (1978). In *Dubrofsky*, for example, the court upheld the warrantless monitoring of a beeper transmitting from inside a package after it had been taken into a residence, reasoning that a device that continually broadcasts "here I am" constitutes only a "slight" intrusion and "is not an impermissible search." 581 F.2d at 211. The court explained (*ibid.*) (footnote omitted):

> Transmitting the package's location is merely an aid to what can be accomplished by visual surveillance. Permissible techniques of surveillance include more than the five senses of officers and their unaided physical abilities. Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the Fourth Amendment in the usual case. On the other hand, wiretaps, breaking and entering, and many other searches and seizures fall on the other side of the line. The issue before us is whether the mere presence of the beeper, it having been attached without violating the Fourth Amendment, sufficiently resembles a wiretap to require the "antecedent justification" that a warrant would provide. We hold that it does not.

Moreover, although the instant case may be factually distinguishable from *Knotts*, the decision below seems to us inconsistent with the principle underlying *Knotts*. Under the teaching of *Knotts*, the use of a beeper to monitor the movement of a container from one location

to another does not disclose information as to which there is a legitimate expectation of privacy, even though each location may itself be private premises, because the actual movement—which is all that the beeper reveals—takes place over public roads. Similarly, the information revealed by the beeper—that it has arrived at a particular location—is the same regardless whether it is broadcasting its signals from a position inside the premises (as here) or outside the premises (as in *Knotts*). The beeper tells nothing about the interior of the premises into which it has been taken other than the fact that it is there. Because, under *Knotts*, respondents had no legitimate privacy expectations with respect to the arrival of the container at any particular locations, it is immaterial that the beeper was actually situated inside private residences or storage lockers at the time its signals were monitored.

Even if the monitoring of a beeper in circumstances such as those present here may be deemed a search or seizure within the contemplation of the Fourth Amendment, the court of appeals erred in imposing a warrant requirement.[7] In determining the reasonableness of law enforcement actions in particular contexts, "the Court has weighed the public interest against the Fourth Amendment interest of the individual." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976). There can be little doubt that the governmental interest served by the beeper surveillance in this case was substantial, if not compelling. See *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980) (Powell, J., concurring). As this case illustrates, a beeper is an extremely useful investigative tool in uncovering illegal drug manufacturing operations. By the same token, a beeper is capable of conveying only strictly limited in-

[7] We have set forth these arguments at length in our brief in *Knotts*, copies which we are sending to counsel for respondents.

formation and poses little threat of revealing to government agents any lawful private activity. See *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10-11. Because the substantial societal concern with drug enforcement outweighs the limited intrusion, if any, on privacy interests resulting from beeper surveillance, use of a beeper to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot.

If reasonable suspicion is sufficient to justify use of a beeper, it follows that a warrant (which may only be issued on probable cause) is not required under the Fourth Amendment. But even if probable cause is required (and probable cause was clearly present here), the monitoring of a beeper should not require a warrant.

We note that, as a practical matter, by imposing a warrant requirement whenever a beeper is taken into a private area, the court of appeals has made it necessary for agents to obtain a warrant in every investigation in which a beeper is used, since they will not know in advance whether the beeper will be inside a private area at the time its signals are monitored. But requiring a warrant simply because a beeper may be monitored while it is inside a private area ignores the lack of substantial privacy concerns implicated by beeper surveillance. The marginal benefits of antecedent judicial control of the limited intrusions affected by beepers are outweighed by the significant costs that would be entailed by a warrant requirement.[8] In short, the decision

[8] Certain technical requirements associated with warrants are difficult, if not impossible, to satisfy in connection with the use of beepers. For instance, the violation of privacy that is supposed to exist in this case is the "search" of the private premises in which the beeper-laden container is located, yet it is plainly impossible to specify in the warrant application the place to be searched (that is precisely what the beeper monitoring it-

below needlessly hampers the ability of law enforcement authorities to employ an extremely effective device in uncovering illegal drug operations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1983

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self discloses). Additionally, because long delays between the procurement of the chemicals and the illicit manufacturing operation are common modus operandi of offenders like respondents, beeper warrants are not amenable to temporal limitation like other warrants. But see *United States* v. *Bailey*, 628 F.2d at 945-946.

APPENDIX A

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE, EVAN ROTH, GENE R. RHODES, DEFENDANTS-APPELLEES.

Nos. 81-1899, 81-1902 to 81-1906.

United States Court of Appeals,
Tenth Circuit.

June 20, 1983.

Before MCWILLIAMS, LOGAN and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This appeal arises from an action in which defendants James Karo, Richard Horton, William Harley, Michael Steele, Evan Roth, and Gene Rhodes were charged with conspiracy to possess cocaine with intent to distribute it, a violation of 21 U.S.C. § 846, and all defendants except Rhodes were charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). The defendants filed a joint motion to suppress evidence against them, claiming that the evidence was obtained in violation of their Fourth Amendment rights. The government had obtained an order authorizing the installation of an electronic tracking beacon (beeper) in a can of ether ordered by Karo, Horton, and Harley through a government informant. Government agents had installed the beeper and tracked the ether over a period of five months, dur-

ing which the can had come to rest in four homes and two rented storage lockers. Using the information obtained from beeper and other surveillance, government agents obtained a search warrant for the last residence to which the ether was taken, where they seized substantial incriminating evidence. The district court held that the order authorizing the installation of the beeper was invalid because the government made deliberate misrepresentations in the affidavits seeking the order. The court suppressed all the evidence obtained from the search of the residence as fruit of illegal monitoring.

The issues on appeal are (1) whether the government's appeal was timely filed; (2) whether the government was required to obtain a search warrant to install the beeper and use it to monitor movements of the can of ether; (3) if the warrantless use of the beeper was illegal, whether the evidence seized under the search warrant for the residence must be suppressed; and (4) whether the district court erred in suppressing the evidence as to all defendants.

I

The government must file its notice of appeal within thirty days after entry of the judgment or order from which it appeals. "A judgment order is entered within the meaning of this subdivision when it is entered in the criminal docket." Fed.R.App.P. 4(b). A motion to reconsider extends the time for filing a notice of appeal only if the motion is filed within the thirty days allowed for filing a notice of appeal. The notice of appeal must then be filed within thirty days after the denial of the motion to reconsider. *United States v. Martinez*, 681 F.2d 1248, 1253 (10th Cir. 1982).

In the instant case the judge stated in open court on May 12, 1981 that the motion to suppress would be granted. A notation of the ruling was made on the docket that day. The judge followed with a written order suppressing the evidence; the written order was dated

and noted on the docket on May 22, 1981. The government's motion for reconsideration was timely if measured from May 22, but was not timely if measured from May 12. The time allowed for appeal begins to run "'[w]hen the trial judge acts in a manner which clearly indicates his intention that the act shall be the final one in [the] case, and a notation of the act has been entered on the docket.' " *United States v. Martinez*, 681 F.2d at 1252 (quoting *Rubin v. United States*, 488 F.2d 87, 88 (5th Cir. 1973)). We believe that the May 22 entry rather than the May 12 entry controls because when the judge made his oral declaration he stated that a written order would be entered. *See United States v. Santia-Manriquez*, 609 F.2d 1162 (5th Cir. 1980); *United States v. Samango*, 607 F.2d 877,880 (9th Cir.1979); *United States v. St. Laurent*, 521 F.2d 506, 411 (1st Cir.1975), *cert. denied*, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976); *see also Carnes v. United States*, 279 F.2d 378 (10th Cir. 1960). Therefore, the government's motion to reconsider and subsequent notice of appeal were timely.

II

The government does not appeal the district court's finding that the order authorizing the beeper was invalid; therefore, the activity in this case must be treated as warrantless installation and monitoring. The government argues that no warrant was needed. Two claims are advanced by the government to support this argument: that the defendants had no expectation of privacy in the can of ether to which the beeper was affixed because the ether was contraband, and that any intrusion from the installation or monitoring of the beeper was too minimal to implicate the warrant requirement.

Ether is not a controlled substance, but the government argues that because the ether was to be used to produce cocaine it can be considered contraband. While courts generally recognize that a person does not have

a reasonable expectation of privacy in or right to possess contraband, *see, e.g., United States v. Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States v. Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States v. Emery*, 541 F.2d 887, 889 (1st Cir. 1976), they have been unwilling to extend this rule to objects that are rightfully possessed but are suspected of use in criminal activity, *see, e.g., United States v. Knotts*, 662 F.2d 515, 517 (8th Cir. 1981), *rev'd on other grounds*, ___ U.S. ___, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980); *United States v. Moore*, 562 F.2d 106, 111 (1st Cir.1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978). We agree that the suspicion that noncontraband material might be used in criminal activity does not turn it into contraband. Therefore, the defendants had a legitimate expectation of privacy in the can of ether.

The government's claims that the installation and monitoring of the beeper were not unlawful searches or seizures are much more difficult issues. Three of the defendants—Karo, Horton, and Harley—ordered ten five-gallon cans of ether from a government information, Carl Muehlenweg. Muehlenweg alerted Drug Enforcement Administration agents about the shipment and told the agents that the ether would be used in the production of cocaine. With Muehlenweg's consent government agents substituted their own can with a beeper installed in it for one of the cans in the shipment. The can containing the beeper was delivered to Muehlenweg's residence in Albuquerque, New Mexico. On September 20, 1980 Karo picked up the ether from Muehlenweg's residence. Using both visual and beeper surveillance, DEA agents traced the ether to Karo's home. An agent subsequently monitored the beeper to verify that the ether was still in Karo's residence. Later that same day the ether was transferred to Horton's

home in the same city. No agent saw the transfer; the new location was ascertained by use of a direction finder, which picked up the beeper signal. A DEA agent also walked the public sidewalk near Horton's residence and smelled the odor of ether in the immediate vicinity of the house.

Two days later, monitoring revealed that the ether was no longer at Horton's house. DEA agents had not observed any movement. They used the direction finder to locate the ether can in a third location, the home of Horton's father. The following day, the beeper was no longer transmitting from Horton's father's home. By using the direction finder, the agents were able to trace the can to a commercial self-storage facility in Albuquerque. When they could not trace the can to a particular locker, they obtained a subpoena and determined that Horton and Harley shared the rental expenses on locker 143. The agents verified that locker 143 contained the ether by walking to the front of that locker and sniffing the odor emanating from the cans. On October 8, 1980, DEA agents obtained an order authorizing installation of an entry tone alarm into the door jamb of locker 143. While opening the door of that locker to install the alarm they observed the cans containing the ether. Thereafter the agents apparently relied upon the entry tone alarm, which malfunctioned. They did not learn of the removal of the contents of the locker until October 16, when the manager of the storage facility informed them that the cans had been removed.

Using their direction finder, the agents picked up the beeper signal three days later at another self-storage facility in Albuquerque. Through discussions with the facility manager, the can of ether was traced to locker 15, which had been rented by Horton and Harley using an alias. The agents obtained an order permitting the installation of an entry tone alarm for this locker, but

instead, with the permission of the manager, installed in a separate locker a closed circuit video camera focused on the door of locker 15. This camera was monitored by DEA agents, who observed Horton and Harley visiting the locker. During this time the order authorizing the beeper lapsed and was extended by court order a few days later. Finally, on February 6, 1981, DEA agents observed by means of the video camera that the ether cans were being removed from the locker by Rhodes. Using both visual and beeper surveillance, the agents followed the ether to Rhodes' residence. The record indicates that the ether remained in a truck parked in the driveway of Rhodes' residence. That same day agents followed the truck to a residence in Taos, New Mexico rented by Steele, Horton, and Harley. The beeper was used to monitor the can of ether while it was inside the Taos residence. Three days later, the government obtained a search warrant for the residence, which was executed the following day. Horton, Harley, Steele, and Roth were arrested at the residence, and cocaine and laboratory equipment were seized in the search.

We first address the question whether the warrantless installation of a beeper in the can of ether designated to go to Karo was constitutionally permissible.[1] The government argues that because its informant, Muehlenweg, consented to placing the ether in the can containing the beeper, no warrant was required. This argument, which some courts have adopted, *see, e.g., United States v. Knotts*, 662 F.2d 515, 517 n. 2

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[1] In *United States v. Knotts*, ___ U.S. ___, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), the Court did not consider the validity of the warrantless installation because it was not challenged in that case. *Id.* at ___ n. *, 103 S.Ct. at 1082 n. *. Here Karo's right to object to the admission of the evidence seized from the Taos house depends upon the validity of the installation, which he did challenge.

(8th Cir. 1981), *rev'd on other grounds*, ___ U.S. ___, 103 S.Ct 1081, 75 L.Ed.2d 55 (1983); *United States v. Bailey*, 628 F.2d 938, 943 (6th Cir. 1980), rests on the assumption that what happens to an object before it comes into the ownership of the defendant cannot be complained of by the defendant. Before Karo took control of the ether, the can with the beeper was the property of the DEA and the ether was the property of Muehlenweg. At that time, the DEA and Muehlenweg presumably could do with the can and ether whatever they liked without violating Karo's rights. But we do not think that the analysis should end at this rudimentary level. Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an intrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned. In *United States v. Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980), the court noted that "[t]here arguably is a right to enjoy the use of goods without the possibility of uninvited monitoring that [even] an unactivated beeper would create." The installation of a beeper on an item of personal property gives the government the capability of tracing every movement of the object on which the beeper is placed. Since items of personal property seldom travel on their own accord, the installation also allows the tracing of movements of the person or persons possessing that object, regardless of the relationship of that person to the information sought by the government. We believe that individuals have a reasonable

and legitimate expectation that the government will not engage in such activity without the protections afforded by resort to the judicial process. *See Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).[2] Thus, regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control.[3] The consent of one owner to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice

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[2] In *United States v. Shovea*, 580 F.2d 1382, 1387-88 (10th Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978) *and* 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979), this Court held that police could affix a beeper to the outside of an automobile if they had probable cause to believe that it would lead to evidence of a crime and exigent circumstances prevented them from obtaining a warrant. *Shovea* recognizes the instrusive nature of the presence of a beeper on personal property; its rule accounts for the lessened expectation of privacy generally associated with automobiles. See also *United States v. Moore*, 562 F.2d at 112-13 (applying probable cause standard for automobiles but requiring warrant for monitoring of box of chemicals).

[3] Even cases relying strictly on the physical intrusion of installation prior to ownership recognize the concept of intrusion that underlies our holding.

> "[S]ince the Government owned the chemicals at the time it installed the beeper, its consent obviated any potential warrant requirement. However, ... the consent of the Government could not satisfy the fourth amendment after ownership and control of the chemicals passed to the defendants. *See United States v. Moore*, *supra*, 562 F.2d at 111; *United States v. Clayborne*, *supra*, 584 F.2d [346] at 349 & n. 1 [(10th Cir. 1978)]. The Government's proposed expansion of the consent exception would allow warrantless installation and monitoring of the beepers or even radio transmitters in any property the Government might decide to sell."

United States v. Bailey, 628 F.2d at 943 n. 7.

to permit the police to periodically open and search the suitcase after it comes under the ownership of another. Therefore, we hold that before the government agents could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant.[4]

We also must determine whether the defendants' legitimate expectations of privacy were violated by the action of the goverment in monitoring the beeper. In *United States v. Knotts*, ____ U.S. ____ , 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), officials tracked a drum of chloroform containing a beeper from the place of its purchase, through an automobile trip, to its burial under a barrel outside a cabin owned by one of the defendants. The Court held that no unlawful search or seizure had occurred because no legitimate expectation of privacy of the defendants had been invaded. *Id.* at ____ , 103 S.Ct. at 1087. In reaching that conclusion the Court relied in large part on the reduced expectation of privacy enjoyed by travelers on public roads. The Court noted that nothing in the record indicated that the beeper was used after the drum had been located in the area of the cabin. It emphasized that visual surveillance from public places along the route or adjoining the premises would have revealed all of the same facts to the police: the beeper was not used "in any way to reveal information ... that would not have been visible to the naked eye from outside the cabin." *Id.* at ____ , 103 S.Ct. at 1087.

In the case before us the beeper was monitored while the can was within private residences and storage lockers. The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant. The

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[4] While we only discuss Karo's interest in the can of ether, we do not foreclose the possibility that others also may have legitimate expectations of privacy in the object at the time of transfer.

Knotts case involved surveillance over only a few days; monitoring in the instant case took place over five months. In *Knotts* the drum was never inside a residence; here the ether was inside four residences. In *Knotts* the officers lost track of the automobile carrying the drum once on the public highway; here the officers lost track on the ether can for significant periods of time, after the ether had come to rest in residences and a rented locker. In the instant case, most of the tracing to new locations was possible ony by use of the direction finder to locate the beeper.

The monitoring of the beeper in the instant case was a different type of intrusion than that in *Knotts*, touching upon privacy interests that historically have been protected by the Fourth Amendment. We hold that the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure. We agree with the statement of the court in *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1493, 55 L.Ed.2d 521 (1978):

> "When defendants withdrew from the public view, taking the box of chemicals with them, they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government. Doubtless the limited data transmitted by a beeper was far less revealing than the conversation recorded in *Katz;* the level of intrusion was less severe. Still, as the chemicals containing the transmitter were not contraband or otherwise wrongfully in appellees' possession, the Government had no right to determine their continued presence in the house by use of warrantless electronic surveillance."

Id. at 113; see also *United States v. Bailey*, 628 F.2d 938, 940 (6th Cir. 1980) ("If the individual legitimately

expected the information or material the Government acquired to remain private, the act of the Government acquiring that information or material constitutes a search or seizure for fourth amendment purposes."); *United States v. Clayborne*, 584 F.2d 346, 351 n. 3 (10th Cir. 1978). *Contra United States v. Bernard*, 625 F.2d 854, 861 (9th Cir. 1980). Legitimate expectations of privacy were violated by the monitoring of the beeper while the can of ether with the beeper attached was located in the defendants' private residences and storage lockers. That the can also traveled by motor vehicle and may not have been protected during such travel does not require a different result. The district court correctly concluded that the government's conduct in monitoring the beeper without a valid warrant was unlawful.

III

Evidence seized pursuant to the search warrant for the Taos residence may be suppressed only if that evidence is tainted by the prior illegal conduct of the government. The test for determining whether evidence derived from prior illegal conduct of the government must be suppressed pursuant to the exclusionary rule was set forth in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963):

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

Id. at 488, 83 S.Ct. at 417. The government contends that the evidence from the search of the Taos residence was obtained by means independent of the beeper in-

stallation and monitoring. The government argues that during some of the time the beeper was being monitored, the defendants were also under physical surveillance. This argument would be convincing if the government could show that the location of the ether had been determined at all times without the aid of the beeper. This it has not alleged nor could it. The record makes clear that several times during the monitoring of the beeper the government agents lost track of the ether and ascertained its location only by use of the beeper. The claim that the agents could smell the ether while it was locked within the residences and the storage lockers is similarly unpersuasive: the agents were in a position to smell the ether only because the beeper had revealed its location.

To the extent that the affidavit filed in support of the search warrant for the Taos residence relied on information supplied by the illegal conduct of the government, there is a link between the prior illegality and the search warrant. The evidence seized from the search of the residence is directly tied to the prior illegal monitoring: without that illegal monitoring the government agents would not have arrived at the Taos residence or known that the ether was within the house. When that information is excised, the search warrant for the Taos residence must fall.

IV

The government contends that even if the warrantless installation and monitoring of the beeper was unlawful, the court's order suppressing the evidence seized from the Taos residence as to all the defendants was in error. The government claims that not all of the defendants have demonstrated the invasion of a legitimate expectation of privacy.

The district court held that each defendant experienced the invasion of a legitimate expectation of privacy and could suppress the evidence seized from the

Taos residence.[5] We agree that the Fourth Amendment rights of Karo, Horton, Harley, Steele, and Roth were violated. The beeper was monitored within the Taos residence jointly rented by Steele, Horton, and Harley. One has a legitimate expectation of privacy within one's home, *Mancusi v. DeForte*, 392 U.S. 364, 369, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154 (1968), as well as within a residence shared with others, *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978). Roth did not rent the Taos house with Steel, Horton, and Harley, but he was a visitor at the house when the search warrant was executed. He had resided there for several days and nights and he had unrestricted access to the house. He therefore had a legitimate expectation of privacy in the house. See *Rakas v. Illinois*, 439 U.S. 128, 140, 149, 99 S.Ct. 421, 428, 433, 58 L.Ed.2d 387 (1978); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *United States v. Robertson*, 606 F.2d 853, 858 n. 2 (9th Cir. 1979). The evidence seized from the Taos residence should be suppressed as to Horton Harley, Steele, and Roth.

Neither Karo nor Rhodes has demonstrated a legitimate expectation of privacy in the Taos residence; they

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[5] In ruling that all of the defendants could challenge the conduct of the government, the district judge stated:

> "Now, as far as standing, in my view, the installation of a beeper is a continuing search. It's not just a search when it's put on the can on the loading dock, or wherever, it's a search wherever that can is tracing. And that's the purpose of the whole thing, is—and as is evident in this case, it did a good job. I say, accordingly, I think each person has standing, has demonstrated standing to challenge, except maybe the Defendant Roth is the only one I have a question about in that regard. Everyone else has demonstrated some connection with, or expectation of privacy where the can was intruded. Some have demonstrated ownership or possession of it. But rather than further complicate the situation, I will just grant the motion to suppress as to all of the Defendants."

can seek suppression of the evidence seized from that residence only if they can demonstrate that that evidence is tainted by prior illegal conduct violating their rights. Karo's right to own and possess the ether without the presence of electronic devices was violated by the illegal installation. The installation of the beeper is inextricably intertwined with the later illegal monitoring of the beeper, including that monitoring directly tied to the search of the Taos residence. Therefore, the evidence seized from that house is tainted by prior illegality infringing on the rights of Karo, and the suppression order for the evidence seized at that house was correct as to him.[6]

While the district court held that Rhodes could challenge the conduct of the government, the court made no factual findings from which we can review that determination. The record does not establish that the beeper was monitored in any place in which Rhodes had a legitimate expectation of privacy. Rhodes did not establish any possessory interest in the ether violated by the in-

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[6] The government, relying on *United States v. Clayborne*, 584 F.2d 346 (10th Cir. 1978), claims that a break in the monitoring served to purge the evidence seized of the taint of the primary illegality. The government asserts that this break occurred when it lost contact with the beeper. However, we do not read *Clayborne* to declare that a simple lapse in monitoring would purge searches occurring thereafter from the taint of illegal monitoring occurring prior to the lapse. That would afford too little protection to the right to be free from warrantless beeper surveillance in places protected by the Fourth Amendment. Law enforcement officials could simply create a lapse by periodically turning off the monitoring device; police would have unfettered discretion in determining when to monitor the inside of private residences and how to redress warrantless monitoring. Further, in the instant case the government cannot point to a break between the illegal monitoring of the second storage locker and the Taos house. Consequently, all evidence obtained subsequent to the illegal monitoring of the second storage locker is tainted in any event.

stallation of the beeper. Therefore, on the basis of this record, the evidence cannot be suppressed as to Rhodes.

We reverse the district court's suppression of evidence as to Rhodes. In all other aspects, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JAMES CONNORS KARO, ET AL., DEFENDANTS.

CRIM NO. 81-21

[Filed Jul 10 1981]

MEMORANDUM OPINION

This matter comes before the Court on the motion of the United States to reconsider and set aside the Order of May 22, 1981 granting defendants' motion to suppress evidence. All evidence which was the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of September 10, 1980 was thereby suppressed. Included as fruit of the electronic tracking device was evidence derived from the installation of "entry tone alarms" in storage lockers in Albuquerque, New Mexico and the search of a house in Taos, New Mexico.

The Court has considered the motion and the memoranda filed in support of, and opposing, the motion to reconsider and finds that it is not well taken. It will therefore be denied.

The Government bases its motion to reconsider on two grounds. One of its contentions is that, in this case, the installation of an electronic tracking device (a "beeper") on the ether container was not an intrusion which required the authority of a warrant issued upon a sworn showing of probable cause. As authority for that

proposition, the Government cites *United States v. Michael*, 645 F.2d 252 (5th Cir. 1981).

In *Michael*, the Fifth Circuit found no violations of a defendant's Fourth Amendment rights from the installation of a warrantless beeper installed on the exterior of his van. The Court held the "minimal intrusion involved in [the] attachment of a beeper to [a defendant's] van, parked in a public place, was sufficiently justified so as to satisfy any of [his] fourth amendment expectation of privacy concerns." *Id.* at 256. The Fifth Circuit's position is not unique, however. Other Circuits, including the Tenth, have also adopted the position that warrantless beeper surveillance for the purpose of monitoring vehicles along public roads is valid. *See, e.g., United States v. Shovea*, 580 F.2d 1382 (10th Cir. 1978), *cert. den.*, 440 U.S. 908 (1979); *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977). As the Fifth Circuit noted in *Michael*, the United States Supreme Court has recognized "significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." 645 F.2d at 257, *citing United States v. Chadwick*, 433 U.S. 1, 12 (1977).

The beeper surveillance in this case went far beyond the monitoring of a vehicle along a public road. The evidence adduced at the suppression hearing established that a beeper was installed in a container of ether which had been ordered by some of the defendants; the ether was subsequently taken by various defendants into at least three private homes, two storage lockers rented by the defendants and finally to a residence in Taos, New Mexico. *United States v. Michael* is therefore inapposite to the facts present here.

The First Circuit, however, has had occasion to consider the question before this Court in *United States v. Moore*, 562 F.2d 106 (1977). In that case, federal agents

had installed a beeper in a cardboard box containing chemicals ordered by the defendants. A second beeper was attached to the defendants' van after they took delivery of the chemicals. Using those beepers in part, the agents followed the defendants to a house and then used the beeper in the box of chemicals to monitor the presence of the chemicals in that house. The agents subsequently obtained a search warrant; the search revealed a number of chemicals and apparatus used in manufacturing controlled substances.

The Court distinguished between the use of a beeper to track a vehicle and the use of one to monitor the continued presence of chemicals in a private home. Finding that once the defendants left the vehicle and entered the house a right of privacy existed free from warrantless intrusion by the government, the Court held that the use of the beeper to monitor the presence of chemicals in the house was an invasion of the privacy of the home. *Id.* at 113.

The Tenth Circuit faced a similar question in *United States v. Clayborne*, 584 F.2d 346 (1978). There, DEA agents installed a warrantless beeper on the inside of a drum of ether ordered by one of the defendants. The defendant subsequently took delivery of the drum and transported it to his house. The agents were able to periodically monitor its presence in his home. During one of those periodic checks, the agent found that the drum was no longer at the defendant's home; independent effort (i.e airplane surveillance) was necessary to reestablish contact. The beeper signal was located at a commercial premises leased by a second defendant and used by defendants as an illicit drug laboratory.

The Tenth Circuit upheld the trial court's decision not to suppress evidence seized from the laboratory. In so during the Court distinguished its decision from that of the First Circuit in *United States v. Moore*. Citing the special facts before it in *Clayborne*, the Tenth Cir-

cuit held that only a slight intrusion, which did not constitute a per se violation of the Fourth Amendment, had occurred and that the use of the beeper without a warrant in that case was not invalid. *Id.* at 351. The Court based its holding on its finding that the beeper surveillance of evidence within the house and that within the laboratory were *not* connected transactions. Thus, the laboratory contact was not tainted by the surveillance within the house. Moreover, the Court found that the privacy to be expected in the laboratory, located in a commercial establishment susceptible to outside viewing as well as public ingress and egress, was not the same as properly would be expected in a home. *Id.* at 350.

This Court's May 22, 1981 Order suppressing the evidence discovered and subsequently seized as a result of the warrantless electronic surveillance of the ether container in the case at bar is in accord with *United States v. Clayborne*. The crucial difference between that case and this one is that, in the instant case, the beeper surveillance within the private homes to which the container of ether was taken and that within the storage lockers and the house in Taos are all one "connected transaction." *Clayborne*, 584 F.2d at 349. Consequently, all contacts with the can of ether which occurred after it was picked up by one of the defendants and taken inside the first private home are tainted.[1] The container

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[1] In United States v. Moore, the First Circuit held that the fact that the defendants initially had no rights in the containers of chemicals was of no significance because they later obtained lawful possession and the agents sought to use the electronic surveillance devices after the defendants obtained that possession. *Moore*, 562 F.2d at 111. It is noteworthy, in light of this Court's holding to that effect at the conclusion of the suppression hearing, that in *Clayborne* the Tenth Circuit indicated that if the proposition had been argued, it would have taken the same position on that point as did the First Circuit. *Clayborne*, 584 F.2d at 349 n.1.

of ether in question here was monitored for a period of several months. During that period the ether was taken into at least three private residences and two storage lockers rented by one or more of the defendants before ultimately being taken to the residence at Taos where the laboratory equipment and drugs were seized. The warrantless electronic surveillance of the houses was impermissible, because the Fourth Amendment clearly protects interiors of private homes from such intrusions. *Id.* at 351. A valid warrant was therefore required in this case to monitor the electronic beeper's signals after ownership and possession had passed to the defendants. *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980).

The United States also contends that the Court erred in its oral ruling on May 12, 1981 when it found that a conflict existed between the testimony of the witnesses DEA Agent Rottinger and Assistant United States Attorney Blackmer over whether the issuing Judge was apprised of the fact that Carl Muehlenweg was a cooperating witness rather than a suspect at the time the application for the order authorizing the use of a beeper was made. At the time of the hearing, the Court was of the impression that there were basic conflicts in the testimony of the DEA Agent and the Assistant United States Attorney as to that point. On that basis, the Court indicated that if it were important, the Court would find that the issuing Judge was not told. However, a review of the transcript reflects that the testimony of the Agent and the United States Attorney were in general agreement as to that point; both indicated that the Judge had been advised of Muehlenweg's status.

That fact, even if assumed to be true, is of no significance in this case. The affidavit was incorrect on its face. It identified Carl Muehlenweg and other unnamed confederates as targets of the investigation. Moreover,

without identifying the incidents as such, the affidavit described the execution of two previous search warrants on drug laboratories which were in no way connected with the then current investigation of the target suspects. The evidence adduced at the suppression hearing estabished that those searches occurred several months earlier and were unrelated to this investigation. That fact appears nowhere on the face of the affidavit. Although the testimony of Rottinger and Blackmer is in agreement that the issuing Judge was told of Muehlenweg's cooperation, the evidence established that those statements, if made, were not sworn to or recorded. An affidavit cannot be so corrected. Unsworn and unrecorded testimony of an affiant before the issuing Judge cannot be considered in determining probable cause for the issuance of a search warrant. *See United States v. Hittle*, 575 F.2d 799 (10th Cir. 1978); Fed.R.Crim.P. 41(c).

It must be clearly noted that the Court is not finding that the off-the-record statements claimed to have been made by the Assistant United States Attorney and the DEA Agent were in fact made to the issuing Judge. Such a determinination is unnecessary under the law. Were such a determination necessary, however, the Government has, by pursuing this course of action, created the untenable situation where the facts as to what transpired could only be resolved by the testimony or affidavit of the issuing Judge.[2] Such a situation cannot even be comtemplated, for it would create the impossible situation where one Judge would be called on to pass on the credibility of another.

It is therefore concluded that the affidavit contains material false and misleading statements and that it was made knowingly and intentionally. In so finding,

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[2] Indeed in this case the defendants offered to obtain a statement or affidavit from the issuing Judge, which offer was refused by the Court.

the Court is mindful of the admonition that affidavits be judged in a "common sense and realistic manner, and warrants issued thereon should not be interpreted hypertechnically." *United States v. Berry*, 423 F.2d 142, 144 (10th Cir. 1970). No matter how worthy its original intentions in proceeding in this manner, as the architect of this dilemma the Government must suffer the consequences of its own error in judgment. On its face the afidavit is false. Once the incorrect and misleading portions of the affidavit are purged, *Franks v. Delaware*, 438 U.S. 154 (1978); *United States v. Axselle*, 604 F.2d 1330 (10th Cir. 1979), the remaining content is not sufficient to establish probable cause. While this is a classic case demonstrating the harshness of the exclusionary rule, the result is clear. The evidence must be suppressed.

/s/ HOWARD C. BRATTON
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAY TERM - June 20, 1983

Before Honorable Robert H. McWilliams, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Court Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE AND EVAN ROTH, DEFENDANTS-APPELLEES.

JUDGMENT

Nos. 81-1899, 81-1902, 81-1903, 81-1904, 81-1905

(D. C. # CR 81-21)

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, *Clerk*

APPENDIX D

JULY TERM - August 26, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

JAMES CONNORS KARO, ET AL,
DEFENDANTS-APPELLEES.

No. 81-1899, 81-1902, 81-1903, 81-1904, 81-1905, 81-1906

This matter comes on for consideration of the petition for rehearing filed by Appellee Gene H. Rhodes in case No. 81-1906, and appellant's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, *Clerk*

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JAMES CONNORS KARO, RICHARD MILES HORTON, WILLIAM ROBERTSON HARLEY, MICHAEL GAYLORD STEELE, and EVAN ROTH, DEFENDANTS.

Criminal No. 81-21

[Filed May 22 1981]

ORDER

Upon consideration of the defendants' motions to suppress evidence, and after hearing evidence and argument thereon, and upon the basis of the findings made in open court,

IT IS ORDERED that all evidence which is the fruit of the installation of an electronic tracking device to follow a quantity of ether pursuant to the Order of September 10, 1980, be and it is hereby suppressed as evidence as to all defendants.

Included in the above order as fruit of the electronic tracking device is evidence derived from the installation of "entry tone alarms" in storage lockers in Albuquerque, New Mexico and the search of a house in Taos, New Mexico,

/S/ HOWARD C. BRATTON
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

JAMES CONNORS KARO, ET AL., DEFENDANTS.

CRIM NO. 81-21

[Filed Jul 10 1981]

ORDER

This matter comes before the Court on the motion of the United States to reconsider and set aside the Order of May 22, 1981 granting defendants' motion to suppress evidence. The Court has considered the motion and entered a Memorandum Opinion herein, and concludes that the motion is not well taken. It will therefore be denied. NOW, THEREFORE,

IT IS ORDERED that the motion of the United States to reconsider and set aside the Court's Order of May 22, 1981 be, and hereby is, denied.

/S/ HOWARD C. BRATTON
United States District Judge